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No. 88-1773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICOH COMPANY, LTD.,
Petitioner,

v.

DONALD L. SNELLMAN d/b/a NORFIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a jury in a patent infringement action, given correct instructions to which no objection was made, could award a lump sum royalty of $12 million as "damages adequate to compensate for the infringement" under 35 U.S.C. § 284 based upon a record which included, *inter alia*, evidence of (a) the infringer's anticipated unlawful sales and (b) a license royalty of $20.5 million paid on the same patent by another infringer.

RULE 28.1 STATEMENT

Donald L. Snellman d/b/a Norfin is a sole proprietorship.

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OPINIONS BELOW

The opinion of the court of appeals vacating the district court's limitation of damages and remanding this case for further proceedings (Pet. App. 27a-41a) is reported at 862 F.2d 283. The opinion of the district court granting a new trial on damages (Pet. App. 2a-6a) is not reported. Prior opinions and orders of the district court (Pet. App. 11a-14a, 15a-19a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1988. A petition for rehearing was denied on February 2, 1989 (Pet. App. 42a-43a). The petition

for a writ of certiorari was filed on May 2, 1989. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The petition for a writ of certiorari seeks this Court's interlocutory review of a typical and ordinary patent infringement case. Petitioner, the infringing party, disappointed with a jury verdict of liability and damages for patent infringement, bases its petition on strained characterizations of the opinion below.

Respondent submits that the Federal Circuit applied the law of patent damages exactly as required by the patent damage statute (35 U.S.C. § 284) and the many court decisions that have construed and applied the statute. The Federal Circuit's decision does not conflict with any decision of this Court, or of any other court of appeals or district court, and petitioner does not contend that the judgment below conflicts with the holding of any prior case. In short, this case raises no novel issue of law and does not warrant review by this Court.

1. Respondent, Donald Snellman, d/b/a Norfin ("Norfin") was awarded U.S. Patent No. 3,414,254 for his improved collator for use with photocopying machines. Consistent with its statutory right to exclusivity (35 U.S.C. § 154), Norfin chose to be the sole manufacturer and seller of the patented collator rather than to grant licenses under the patent to others. Accordingly, Norfin rejected license requests from petitioner Ricoh Company, Ltd. ("Ricoh"). Despite the absence of a license, two companies, IBM and Ricoh, made collators utilizing the '254 patent without Norfin's permission and Norfin sued each of these infringers. Norfin ultimately granted IBM a lump-sum license for which IBM paid Norfin $20.5 million.

2. This petition arises out of Norfin's infringement suit against Ricoh. Following jury trial in the United

States District Court for the Northern District of California on liability and damages, the jury found the patent valid and infringed and assessed damages at $12 million. (Pet. App. 1a). The jury had before it damage calculations and evidence from both parties. Norfin's evidence addressed those factors that would have affected a hypothetical negotiation between a willing licensor and willing licensee and emphasized an internal Ricoh document showing that petitioner anticipated sales of 40,000 to 50,000 machines with infringing collators (Pet. App. 38a). Norfin's evidence also included the IBM-Norfin lump sum royalty agreement of $20.5 million for infringement of the same patent. The jury instructions on damages—to which petitioner did not object—correctly and carefully informed the jury's deliberations and charted the various options available to the jury.

Because the jury instructions on damages are pivotal to petitioner's challenge to the decision below, we set them out verbatim in Appendix A, *infra* ("App. A") and summarize them here:

1. Compensation is called "damages" and under the patent law is that amount "adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer". 35 U.S.C. § 284.

2. "Reasonable royalty" is defined as the price or rate that a hypothetical buyer or licensee would have paid and a hypothetical seller or licensor would have taken for the patent rights in a hypothetical negotiation with neither party compelled or coerced.

3. A "reasonable royalty" may be

   (a) a percentage of infringer's sales or

   (b) a lump sum amount (paid-up license).

4. Factors to consider in deciding to award "percentage of infringer sales" or "lump sum" amount include

(a) royalties paid for comparable licenses,

(b) patentee's policy not to license at all or license under special conditions to preserve patent exclusivity, and

(c) anticipated use by the infringer.

5. If damages are to be measured by a "lump sum" amount (or paid-up license), then a "reasonable royalty" should not be calculated by actual sales or by events occurring after the infringement; rather the calculation is based upon expectations of the parties at the time of infringement.

6. If damages are to be based upon a "percentage of infringer sales", then a "reasonable royalty" should be calculated upon the actual infringing sales made in the United States.

Petitioner moved for post-trial relief from the verdict. The district court granted petitioner's motion for a new trial on the issue of damages. It ruled that the admission into evidence of the $20.5 million IBM-Norfin agreement was "probably error" and that certain of petitioner's sales projection figures for the infringing devices "were irrelevant" and "should have been either excluded or appropriately limited by admonition" (Pet. App. 6a). Over Norfin's objections, the district court refused to permit such evidence at any new trial and entered an order precluding Norfin "from offering damage calculations at trial in excess of . . . $453,000." (Pet. App. 19a). Consequently, Norfin consented under protest to entry of judgment of $453,000 in damages (based solely upon the number of infringing devices sold) plus prejudgment interest of $287,767, in order to pursue an appeal on the damages issues.

3. On appeal, the Federal Circuit affirmed the judgment holding petitioner liable for patent infringement, but vacated the damages judgment and remanded for

further proceedings.[1] In essence, the court of appeals held that the district court had done it right the first time, *i.e.*, there was no error in the jury trial and, therefore, no grounds upon which the district court could set aside the jury's verdict.

With respect to evidence of petitioner's projected sales of 40,000-50,000 infringing machines, the court of appeals held that such evidence was "relevant and proper in determining a reasonable royalty" (Pet. App. 38a). Moreover, the court observed (*ibid.*), "Ricoh did not object to an instruction that directed the jury to calculate damages 'based upon or measured by the expectations of the parties at the time of infringement,'" and, therefore, "[t]he jury justifiably could have calculated a lump sum royalty based on Ricoh's expected sales. . . ."

In response to Ricoh's challenge to its own sales forecast of 40,000-50,000 infringing machines upon which Norfin relied in its damages case, the court noted that both sides had placed before the jury evidence of Ricoh's anticipated sales of infringing machines, and that "the jury considered both sales forecasts and accepted that of Norfin." (Pet. App. 39a) "The jury was authorized to do so," the court concluded (*ibid.*), relying on this Court's statement in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 856 (1982), that "[d]etermining the weight and credibility of the evidence is the special province of the trier of fact."

With respect to Norfin's $20.5 million royalty agreement with IBM, the court of appeals observed that "[t]he district court did not explain why it concluded "that the admission of that agreement into evidence was "'probably error'" (Pet. App. 39a). After considering petitioner's arguments on this point, the court of appeals

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[1] The petition for a writ of certiorari raises no issue relating to Ricoh's liability for patent infringement. Accordingly, our discussion will focus on damages issues only.

held that the Norfin-IBM agreement "properly was admitted into evidence and the jury was justified in considering it in determining a reasonable royalty" (*ibid.*).

In light of its rulings that Norfin's evidence was properly admitted at trial, the court of appeals held that the district court's rejection of the jury verdict could not stand. Accordingly, the Federal Circuit vacated the judgment limiting damages to $453,000 plus interest and remanded the case for further proceedings with the following instructions:

> The district court has broad discretion in conducting those proceedings. Among other things, the court may conduct a new trial on damages in accordance with our rulings on the evidence admissible on that issue or may reinstate the jury verdict.

(Pet. App. 40a).

4. The proceedings on remand are currently underway in the district court. On March 16, 1989, Norfin moved for reinstatement of the jury verdict on damages; petitioner has moved for a new trial. Both motions are presently *sub judice* in the district court.

ARGUMENT

THE INTERLOCUTORY JUDGMENT OF THE COURT OF APPEALS IS CORRECT AND DOES NOT CONFLICT WITH ANY OTHER APPELLATE DECISION

The decision below rests on the wholly unexceptional proposition that in calculating damages in a patent infringement case, the trier of fact may consider evidence of the infringer's projected sales of the infringing product and of a royalty agreement with another infringer of the same patent. The submission of such evidence to a properly instructed jury—and in this case, petitioner made no objection to the jury instructions—surely does not warrant review by this Court.

1. There is no merit to petitioner's contention that the Federal Circuit's decision is inconsistent with the "rea-

soning" of *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964) ("*Aro II*"). First, *Aro II* is not relevant to the determination of a "reasonable royalty" under 35 U.S.C. § 284. Second, to the extent *Aro II* addresses patent "damages," it is fully consistent with the Federal Circuit's treatment of this case.

In *Aro II*, this Court analyzed whether, under 35 U.S.C. § 284, a patentee could recover an infringer's "profits" as well as any "damages" suffered by a patentee. This Court noted that Section 284 changed the prior law under which a patentee, as compensation for infringement, could recover "damages," plus the infringer's "profits." Under Section 284, on the other hand, the patentee's measure of compensation is "damages adequate to compensate for the infringement" "in no event less than a reasonable royalty." Thus, *Aro II* held that the infringer's "profits" were not recoverable as such. *Aro II* does not instruct how to determine a "reasonable royalty" under the statute and thus does not conflict in any sense with the Federal Circuit's decision in this case.

In fact, *Aro II*'s general discussion of damages is entirely consistent with the decision below. In *Aro II*, this Court observed (377 U.S. at 507) that the "damages" a patentee may recover are defined as "compensation for the pecuniary loss he [the patentee] has suffered from the infringement, without regard to the question whether the infringer has gained or lost by his unlawful acts. *Coupe v. Royer*, 155 U.S. 565, 582 [1895]." This is precisely what the jury did here, under proper instructions, and the Federal Circuit's decision recognizes that fact.

2. Petitioner invites this Court to rule that a "reasonable royalty" *must* be based upon "actual sales or uses of the patented invention" (Pet. 3). No court has ever so ruled; the statute and its legislative history do not so require, and petitioner does not contend otherwise. Indeed, neither this Court nor any lower court has limited

a patentee's recovery to damages based solely upon the actual use made of the infringer's patented invention.

With respect to the statutory language, Section 284 requires that a prevailing "claimant" be awarded "damages adequate to compensate for the infringement", and further provides that damages may not *fall below* "a reasonable royalty for the use made of the invention by the infringer." The courts have fleshed out the statutory formulation with the objective of making the patent holder whole by putting him in the position he would have been in but for the infringement. As this Court stated in *Aro II*, 377 U.S. at 507, "[damages] have been said to constitute 'the difference between his pecuniary condition after the infringement, and what his condition would have been if the infringement had not occurred,'" *citing*, *Yale Lock Mfg. Co. v. Sargent*, 117 U.S. 536, 552 (1886). Thus, "damages" may be assessed in any of a number of ways, including a patent owner's lost profits (if lost profits can be proved); an established royalty (if an established royalty exists); or a "reasonable royalty," which can take the form of a lump sum royalty payment or a running royalty depending upon the facts. In ascertaining what constitutes a "reasonable royalty", nothing in the statute or its legislative history suggests that the term "use made of the invention" was intended as a *limitation* on the manner of determining "a reasonable royalty."

Furthermore, the courts have uniformly held that royalties for "use" of patented inventions are not limited to "actual use." For example, in *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950), this Court recognized that patent license royalties need not be tied to actual use or sale of products under the patent. In *Automatic Radio*, patent licensor Hazeltine licensed patents to licensee Automatic Radio and a royalty was required irrespective of actual use. Automatic Radio insisted that the license agreement was unenforceable be-

cause it was a "misuse of patents" to require the licensee to pay royalties even though the patents may not be used. This Court rejected that contention (*id.* at 834):

> What it [licensee Automatic Radio] acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them. If it chooses to use none of them, it has nevertheless contracted to pay for the privilege of using existing patents plus any developments resulting from respondent's [Hazeltine's] continuous research.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 138-39 (1969), this Court reconfirmed its holding in *Automatic Radio*:

> [I]f the licensee bargains for the privilege of using the patent in all of his products and agrees to a lump sum or a percentage-of-total-sales royalty, he cannot escape payment on this basis by demonstrating that he is no longer using the invention disclosed by the patent.

Likewise, in an analogous copyright case, this Court in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), held that a copyright licensee can lawfully be required to pay a "flat fee regardless of the amount of use it makes of ASCAP compositions and even though many of its programs contain little or no music," (*id.* at 8), *citing Automatic Radio* and *Zenith*.

Thus, the principle that a lump sum licensee royalty is proper without regard to actual use is widely accepted and to our knowledge has never been rejected. Indeed, it is the very basis upon which patentees routinely grant licenses for lump sum royalty payments not tied to actual use. The identical principle is routinely used by the courts in the willing licensee-willing licensor analysis to determine "reasonable royalty" under the patent statute.[2]

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[2] Petitioner concedes that such lump sum awards are proper. *See* Pet. 17.

And indeed, the jury instructions in this case, to which petitioner did not object, expressly permitted the jury to make a "lump sum" or "paid-up" royalty award, not "calculated or measured by the actual sales of the machines, or by other events that occurred after the infringement; rather, the calculation is based upon or measured *by the expectations of the parties at the time of infringement.*" (App. A, *infra*, 4a-5a) (emphasis added).

Particularly well-settled and unexceptionable is the instruction that the jury consider the amount a reasonable licensor would accept for a license "at the time of infringement." *See, e.g., TWM Mfg. Co. v. Dura Corp.*, 789 F.2d 895, 899-900 (Fed. Cir.), *cert. denied*, 479 U.S. 852 (1986).[3] Here, the jury heard the parties' conflicting evidence on Ricoh's expected sales of the product (and thus, the value of a license). As the court of appeals recognized (Pet. App. 39a), the jury simply accepted Norfin's evidence and calculated a lump sum award on that basis.

In short, petitioner asks this Court to change well-accepted law and practice in the patent field and put a judicial straitjacket on the patent damages statute. This Court should decline petitioner's wholly unjustified invitation to rewrite the statute.

3. Nor is there any merit to petitioner's exaggerated recitation of the ramifications of the decision below. In an effort to elevate this routine case into a matter of significance beyond the parties, petitioner congers up a

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[3] In *TWM*, a patent damages case, petitioner, at page 4 of its petition for a writ of certiorari, No. 86-145, argued the following as a basis for granting certiorari:

> This petition will demonstrate that the Court of Appeals for the Federal Circuit has so liberalized the standards for determining damages in patent cases as to demand the intervention of this Court.

This Court denied certiorari in *TWM* as it should here.

chamber of imagined horrors: an "*in terrorem* effect on inventors" (Pet. 18), "wildly disproportionate damages for inadvertent acts of infringement" (*Id.* at 17), and "tremendous adverse impact on the orderly administration of patent litigation in the district courts" including damages based upon "imaginary elements" (*id.* at 18). The reality is far more mundane.

The Federal Circuit has simply applied well-established principles of patent damage law to the particular facts of this case. The record in this case shows that the jury had before it evidence of the patent owner's no-license policy, a post-litigation license under the same patent and under similar circumstances, and the infringer's anticipated sales activity, as well as evidence from which the jury could conclude that a lump sum royalty award was what the parties would have negotiated. Moreover, the unchallenged jury instructions are a model statement of the law of patent damages. They properly instructed the jury with respect to the willing licensor-willing licensee analysis for determining a reasonable royalty and also properly instructed the jury with respect to whether the royalty should be a lump sum payment or a payment based upon actual sales.[4] The jury evaluated the evidence in light of the instructions and reached a verdict which the Federal Circuit properly characterized as justifiable. There was no basis for granting a new trial or limiting the relevant evidence as petitioner proposes and, there-

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[4] Not only did petitioner accept without objection the jury instructions at trial, but in addition, petitioner argued the following in its motion for a new trial (C.A. App. 321):

> The jury could reasonably have decided that the hypothetical willing licensor/willing licensee would have entered into a fully paid up license, also known as a lump sum license. The jury was free to use its discretion as to what the precise royalty amount would be. . . .

Thus, petitioner's real complaint is with the jury's evaluation of the evidence, certainly not a matter for review by this Court.

fore, the court of appeals decision rests on solid ground. It does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Uncontested Jury Instructions on Damages, Appendix in Federal Circuit, pp. 306-311

Now, if you should conclude from the evidence that Ricoh did not infringe the Snellman patent, then you should proceed to consider the next cause of action, which is the one for breach of contract. If, however, you find that Ricoh did infringe the Snellman patent, either by literal or equivalent infringement, then you should proceed to determine what compensation Mr. Snellman should receive for that infringement.

We call this compensation 'damages'.

The fact that I'm about to instruct you on a measure of damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance in the event that you should find in favor of the plaintiff, on the questions presented to you, by a preponderance of the evidence and in accordance with other instructions.

Under the United States patent laws the plaintiff is entitled to 'damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer'.

A 'reasonable royalty' is defined as the price or rate that a hypothetical buyer would have paid to a hypothetical seller for the rights to the patent where neither party was compelled or coerced to enter the agreement.

We refer to this definition as the 'willing buyer, willing seller' rule. In other words, considering all the factors that would have affected the bargaining process, what would a person who wanted the rights to the patent have been willing to pay and what would a person who owned the rights to the patent have been willing to accept if

neither one was forced to enter an agreement. This is the measure of a reasonable royalty.

The focus of these willing buyer, willing seller negotiations is at the time of infringement. The controlling factor is the sales or profits that the parties would have anticipated or projected at the time of the hypothetical negotiations. The hypothetical negotiations are conducted with respect to the licensing under the United States patent.

The United States patent only gives the plaintiff the right to exclude others from making, selling or using the patented invention within the boundaries of the United States. The United States does not give the patent holder any rights with respect to the manufacture, sale or use of the patented invention outside of the United States.

A reasonable royalty is often expressed as a percentage of the infringer's sales, but it can also be awarded as a lump sum amount, or in effect, as a paid-up license. You should decide, based solely on the evidence presented in this trial, whether the parties in this case would have agreed to a royalty based on a percentage of sales or as a lump sum amount.

To determine the amount of royalty damages to award, you should consider a wide range of factors that would have affected a hypothetical negotiation between a willing licensor and a willing licensee. Some of the factors which may be considered by you include the following: The royalties received by Norfin or Mr. Snellman for licensing the 254 patent which prove or tend to prove the value or worth of the patent; royalties paid by the licensee, Ricoh, for the use of other patents comparable to the 254 patent; the nature and scope of the license as exclusive or nonexclusive, as restricted or nonrestricted in terms of territory, or with respect to whom the manufactured product may be sold; Norfin's established policy and marketing program to maintain that patent monopoly

by not licensing others to use the invention, or by granting licenses under special conditions designed to preserve the monopoly; the commercial relationship between Norfin and Ricoh, such as whether they are competitors in the same territory, in the same line of business, or whether they are inventor and promoter; the effect of selling the patented specialty and promoting sales of other products of the licensee; the existing value of the invention to the licensor as a generator of sales on his nonpatented items, and the extent of such derivative or convoyed sales; the duration of life remaining on the patent, and the length of term of other license which the parties would negotiate; the established profitability of the product made under the patent, its commercial success, its current popularity; the utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results; the nature of the patented invention, the character of the commercial embodiment as owned and produced by the licensor, and the benefits to those who have used the invention; the extent to which the infringer anticipated using or actually used the invention, and any evidence probative of the value of such use; the portion of the realizable profit that should be credited to the invention as distinguished from nonpatented elements; the manufacturing process, business risks or significant features or improvements added by the infringer; the opinion testimony of the patent holder and the licensee as to what would be a reasonable royalty; the opinion testimony of qualified experts; the amount that a licensor and a licensee would have agreed upon at the time the infringement began if both had been reasonably and voluntarily trying to reach an agreement, that is, the amount which a prudent licensee, who desired his business proposition to obtain a license to manufacture and sell a particular article embodying the patented invention, would have been willing to pay as a royalty, and yet anticipating being able to make a reasonable profit, and which amount

would have been acceptable to a prudent patentee who was willing to grant a license.

If you find, by a preponderance of the evidence, that the Snellman patent gave the Ricoh copiers their essential marketability, that is, the copiers could not reasonably have been marketed by Ricoh without the Snellman patent technology, anticipated royalty damages may be based upon Ricoh's anticipated revenues not only from the collator sales, but also from the sales of Ricoh's compatible copiers. However, if you find, by a preponderance of the evidence, that the Snellman patent did not give the Ricoh copiers their essential marketability, that is, the copier could reasonably have been marketed by Ricoh without the Snellman patent technology, then reasonable royalty damages may be based upon Ricoh's anticipated revenues only from the collator sales, but not from the sales of Ricoh's compatible copiers.

If you determine damages are to be measured by a lump sum amount or paid-up license, then a reasonable royalty should not be calculated or measured by the actual sales of the machines, or by other events that occurred after the infringement; rather, the calculation is based upon or measured by the expectations of the parties at the time of the infringement.

On the other hand, if you determine that damages are to be measured by a royalty rate on percentage of sales, then a reasonable royalty should be calculated upon the actual sales made by Ricoh in the United States.

The burden of proof as to the amount of damages rests with Mr. Snellman by a preponderance of the evidence.

It is important to note that damages need not be proven with mathematical certainty. The law provides that you shall award damages if the plaintiff establishes a reasonable basis for the award.